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No. 93-1276

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

vs.

BRUCE ROY LEE,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

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OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals en banc dated October 7, 1993, is reported at 6 F.3d 1297. Lee Pet. App. at A-2 to A-17.[1/] The panel opinion of the Eighth Circuit Court of Appeals dated June 10, 1991 is reported at 935 F.2d 952. Lee Pet. App. at A-19 to A-27.

JURISDICTION

Petitioner Bruce Roy Lee was convicted and sentenced for violating 18 U.S.C. §844(h)(1) on May 18, 1990 by the United States District Court in Minnesota. Lee Pet. App. at

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1/ Respondent filed a Petition for Certiorari on January 4, 1994 in which he seeks review of the First Amendment aspects of this case. See, Bruce Roy Lee v. United State of America, No. 93-7412. The above citation is to the Appendix filed in that case.

A-28 to A-31. The Eighth Circuit reversed Lee's §844(h)(1) conviction on June 10, 1991. On August 14, 1991, the Eighth Circuit en banc rejected the United States' suggestion for rehearing of the panel's reversal of the §844(h)(1) conviction. Lee Pet. App. at A-18. On December 21, 1993 the United States requested and was granted an extension of time to petition for certiorari to February 4, 1994. Its Petition was filed February 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISION AND FEDERAL STATUTE INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

Section 844(h) provides that "[w]hoever . . . uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years." 18 U.S.C. §844(h) (1988).

STATEMENT OF THE CASE

Respondent Bruce Lee burned a cross on August 11, 1989 in a field behind the Tamarack Apartments in Coon Rapids, Minnesota. Co-defendant Werner Jahr and Lee's girlfriend,

Debbie Dockter, were residents of the Tamarack Apartments. T.84.[2/]

Jahr and Lee decided to burn a cross "to make a statement" in response to racial tension at the Tamarack Apartments. T. 92, 95, 110. They made a cross out of scraps of 2 x 4 lumber. T. 87. The cross was burned on a small hill in an open field about 386 feet behind the apartment complex. T. 128, 269. The cross never fully ignited and only burned for 30 to 60 seconds. T. 104, 128.

Mr. Lee was charged with conspiracy to violate civil rights in violation of 18 U.S.C. §241 (Count I), interference with housing rights by means of force or the threat of force in violation of 42 U.S.C. §3631(a) (Count II), and the use of fire in the commission of a felony in violation of 18 U.S.C. §844(h)(1) (Count III). Mr. Lee was convicted on Counts I and III, and acquitted on Count II. Lee Pet. App. A-28. Mr. Lee appealed his conviction on Counts I and III.

On appeal, a panel of the Eighth Circuit Court of Appeals affirmed the Count I conspiracy conviction but reversed the Count III conviction for using fire in the commission of a felony. Lee, 935 F.2d at 953; Lee Pet. App. at A-19. The government's Petition for Rehearing on Count

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2/ "T." refers to the transcript of the trial in District Court.

III was denied. Lee, 6 F.3d at 1299; Lee Pet. App. at A-18. On rehearing en banc, the Eighth Circuit reversed the Count I conviction and remanded for a new trial with new jury instructions. Lee Pet. App. A-1.

The Solicitor General sought and was granted an extension of time to February 4, 1994 to petition for a writ of certiorari. United States Pet. App. 1. On February 4, 1994, the United States filed its Petition seeking review of the June 10, 1991 final judgment reversing Lee's Count III conviction. Meanwhile, on January 4, 1994, Bruce Roy Lee filed a Petition for Writ of Certiorari regarding the First Amendment aspects of the case (No. 93-7412).

ARGUMENT

The United States' Petition for Writ of Certiorari in this matter should be denied for several reasons.

1. The United States' Petition is not timely. Supreme Court Rule 13.1 requires that a petition for writ of certiorari be filed "within 90 days after the entry of the judgment." When a party requests rehearing in the appellate court, the time for petitioning "runs from the date of the denial of the petition for rehearing." Supreme Court Rule 13.4. "The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." Supreme Court Rule 13.3.

Here, the Eighth Circuit panel reversed Lee's §844(h)

conviction on June 10, 1991. On August 14, 1991, the Eighth Circuit ordered that "rehearing en banc . . . is granted as to Count I only," and vacated the June 10, 1991 opinion and judgment "as it pertains to Count I." Lee Pet. App. A-18. The final judgment regarding Count III was thus the Eighth Circuit panel's June 10, 1991 decision reversing Lee's conviction. The United States had 90 days after its petition for rehearing was denied on August 14, 1991 to petition for writ of certiorari regarding the Eighth Circuit's disposition of the §844(h) count. It neither timely filed a petition nor sought an extension of time in which to file. The United States did not file a petition on this question until February 4, 1994, over two and one-half years after final judgment was entered.

Petitioner argues that the above-quoted portion of Rule 13.4 does not apply when review is sought of "aspects of a panel's holding that are not encompassed within the grant of review." This is a misstatement of Rule 13.4. The rule clearly provides that the time for petitioning "runs from the date of the denial of the petition for rehearing." Supreme Court Rule 13.4. The Eighth Circuit denied the government's petition for rehearing Count III on August 14, 1991. Petitioner's argument that it would not be "wise" to "split" this case has no merit. The Solicitor General could have avoided "splitting" the case by making a motion to stay

the appellate court proceedings while it made a timely petition to the United States Supreme Court. This would have both facilitated the "wise judicial administration" of the case and satisfied the timing requirements of Rule 13. The United States' February 4, 1994 Petition should be denied because it is jurisdictionally out of time.

2. The United States' Petition should also be denied because the Eighth Circuit correctly decided the issue. Construing §844(h)(1) as proposed by petitioner would lead to the absurd result of enhancing Lee's sentence by five years merely because, in exercising his free speech rights, he ignited two scraps of 2 x 4 lumber that burned for less than one minute. See, e.g., Ashley Drew & Northern Railway v. United Transportation Union, 625 F.2d 1357 (8th Cir. 1980) (reasoning that it is inappropriate to adhere to a literal reading of a statute when absurd consequences result); but see, United States v. Hayward, 6 F.3d 1241, 1246, n.6 (7th Cir. 1993) (recognizing that a five-year enhanced penalty for cross burning is "stern" but not so "outlandish that Congress could not have intended it"). The Eighth Circuit properly looked to the legislative history of §844(h)(1) to determine Congress' intent in amending the statute.

Section 844(h)(1) was amended by the "Anti-Arson Act of 1982" to make it easier to prosecute arson by removing

the requirement of proving that the source of damage was an "explosion." Lee, 935 F.2d at 958 (citing H.R. Rep. No. 678, 97th Cong., 2d Sess. 1-2, reprinted in 1982 U.S.Code Cong. & Admin.News 2631-32; United States v. Fiore, 821 F.2d 127, 131 (2d Cir. 1987)). The cross burning here was not arson, nor did it damage anything but the scrap lumber used to build the cross. Id. The Eighth Circuit properly decided that it was unclear whether Congress intended §844(h)(1) to apply to these facts.

Petitioner's reliance on Smith v. United States, 113 S.Ct. 2050 (1993), is unpersuasive. Petitioner argues that the Court's broad construction of "use" in Smith should be applied to §844(h)(1). U.S. Pet. App. at 7. However, petitioner erroneously reasons that Lee "used" fire to commit the felony of "threatening" residents of the Tamarack Apartments. Id, at 8.

Conspiracy is the offense Lee was convicted of under §241. See, e.g., United States v. Guest, 383 U.S. 745, 753 (1966) (construing 18 U.S.C. §241). Proof of a conspiracy under §241 requires proof of an agreement to interfere with the exercise of a federal right. Id.; United States v. Jacobs, 451 F.2d 530, 539 (5th Cir. 1971) (reasoning that the essence of conspiracy is the agreement). Although overt acts may be evidence of an agreement, it is the agreement itself rather than the overt act that is proscribed by §241.

United States v. Mirato, 454 F.2d 167, 169 (5th Cir. 1972).

Assuming there was a conspiracy, the agreement would have been made long before the cross was ignited. See, Hayward, 6 F.3d at 1248, n. 9. (finding that defendant waived this argument because it was raised for the first time on appeal - Lee raised this issue below although the Court did not reach it). No matter how broadly "use" is defined, it is inconceivable that Lee "used" fire "to commit" the crime of conspiracy, as required for conviction under §844(h)(1). Compare Smith, 113 S.Ct. at 2058-59 (construing 18 U.S.C. §924(c)(1), which punishes "use" of a firearm "during and in relation to" a drug offense, broadly to mean there was no accident or coincidence). At most, the burning cross here was evidence of an agreement; it was not the agreement itself. Absent an agreement, there is no felony under §241. Petitioner's reliance on the Court's construction in Smith of entirely different language in a different statute is misplaced.

Moreover, it is inconsistent with the First Amendment to punish the use of fire when that use is solely to express a message. The government's prosecution of Lee under §844(h)(1) is nothing more than an attempt to regulate disfavored speech. Without fire there would be no expressive conduct. Had Lee erected a cross without burning it, the "message" conveyed would have been far different.

Accord Hayward, 6 F.3d at 1247 ("One cannot reasonably argue that merely erecting a wooden cross . . . has the same effect as setting the cross on fire.")

This Petition should be denied because the Eighth Circuit properly construed §844(h)(1) as applying to acts of arson, and not to expressive uses of fire.

3. If the Court is inclined to grant the United States' Petition, it should also grant Bruce Roy Lee's Petition filed on January 4, 1994. By granting certiorari in both cases, the Court can comprehensively consider and resolve the intertwined questions raised by the parties.

The conflict between the Seventh and Eighth Circuits cannot be resolved by considering the Hayward petition alone and holding the Lee Petition in abeyance, as suggested by the Solicitor General. Lee petitioned for a writ of certiorari to resolve whether, as a matter of law based on the facts of his case, he could be convicted for conspiracy under 18 U.S.C. §241 without violating the First Amendment. Lee Pet. App. at i. The Solicitor General herein petitioned for certiorari on the question of whether 18 U.S.C. §844(h) could be applied to a cross burning conspiracy. United States Pet. App. at (I). The Hayward defendants petitioned for certiorari on the question of whether the "non-destructive statement" of a cross burning could be prosecuted under §844(h) as an "act of arson," and whether

42 U.S.C. §3631(b) on its face violated the First Amendment. Hayward Pet. App. at i, 16.

Each of these petitions raises distinct issues relating to different statutes. The Court's consideration of one petition will not resolve the questions raised by the others. As the Hayward court noted, it is "the government's common practice" to charge cross burning cases under the three statutes at issue in these petitions. Hayward, 6 F.3d at 1246, n. 5 (citing six recent cases). The conflict between the Seventh and Eighth Circuits is likely to arise again in the future. If the Court decides to grant any of the petitions, granting all of them or at least those in United States v. Lee, would enable the Court to properly and fully consider the First Amendment questions raised when cross burnings are prosecuted under 18 U.S.C. §844(h).

As argued by Lee below, the application of 18 U.S.C. §844(h) to Lee is due exclusively to his using fire to aid in symbolic expression, a purpose which Congress did not have in mind when the statute was passed. Because burning a cross is a communicative act (indeed, Lee's prosecution was brought precisely as a result of the act's expressive content), the Court should grant Lee's Petition for Certiorari if it is inclined to grant the government's. See, Brandenburg v. Ohio, 395 U.S. 444 (1969) (cross burning protected by First Amendment); R.A.V. v. City of St. Paul,

___ U.S. ___, 112 S.Ct. 2538 (1992) (ordinance banning cross burnings unconstitutional); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning within scope of First Amendment). The issue of whether an enhanced sentence should be imposed for engaging in an expressive act under §844(h) is closely related to the First Amendment issues raised by Lee in his Petition. Section 844(h) cannot be adequately treated without reference to those First Amendment considerations.

4. The Solicitor General is attempting to manipulate the process in this matter to fit his agenda. The Solicitor General admittedly prefers to argue the United States' position based on the facts presented in Hayward. United States Pet. App. at 7. The government prevailed in that case, the facts of which were more egregious in that two separate cross burnings took place on the private property of targeted victims. United States v. Hayward, 6 F.3d 1241, 1244 (7th Cir. 1993). Lee, on the other hand, presents the First Amendment issues more fully as a result of the placement of the cross in an open field and its being directed at the community residing in the apartment complex, factors which would constitute a basis for distinguishing the narrower Hayward holding. The Eighth Circuit holding is also more authoritative as an en banc ruling.

CONCLUSION

The United States' Petition for Writ of Certiorari in this matter should be denied because it is untimely and the issue was properly decided by the Eighth Circuit. In the alternative, this Petition should be consolidated with the Petition of Bruce Roy Lee so that the Supreme Court can comprehensively resolve both the First Amendment and statutory issues raised.

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Respectfully submitted,

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